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Supreme Court of the United States

October Term, 1975

No. 75-1193

FRANK COTRONI and FRANK DASTI,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1975

No. .....

FRANK COTRONI and FRANK DASTI,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Frank Cotroni and Frank Dasti, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals is as yet unreported and appears in the appendix, *infra*, at pp. 1a-8a. The opinions of the District Court are unreported and appear in the appendix, *infra*, at pp. 11a-27a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1975. On January 13, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to February 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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Questions Presented

1. Whether American involvement in warrantless Canadian wiretapping implicates the Fourth Amendment of the United States Constitution, requiring exclusion of the wiretap evidence in a criminal trial in the United States.

2. Whether wire communications intercepted over the United States Telecommunication Network by joint American-Canadian participation and cooperation, without the slightest compliance with 18 U.S.C. § 2510 et seq. (Title III) should be excluded from evidence in United States courts.

Constitutional Provision Involved

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement

After a jury trial in the United States District Court for the Eastern District of New York petitioners, Canadian citizens, were convicted of conspiring to import cocaine into the United States (Count I) and of receiving and concealing nine kilograms of cocaine (Count II). Cotroni was sentenced to concurrent fifteen year terms of imprisonment and fined twenty thousand dollars. Dasti was sentenced to concurrent fifteen year terms of imprisonment to run concurrently with a prior twenty year sentence of imprisonment imposed upon him in the United States District Court for the District of New Jersey.

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The government's main witness, whose testimony was indispensable to the prosecution, was a highly impeachable co-conspirator; international drug trafficker, Guiseppe Catania, who was "cooperating" with the government in order to avoid a heavy prison sentence.

His testimony was buttressed by another cooperative co-conspirator drug peddler, George Stewart, who had never met the petitioners, by hotel and airline records, and by police surveillance of various meetings petitioners had with other alleged co-conspirators. Critical corroboration was provided however, by wiretap evidence furnished the prosecution by Canadian police. The wiretapping was commenced by the Montreal Police Force, without court authorization, in July 1970, as part of a general gambling investigation. Taps were placed at both the homes and social club of petitioners in Montreal. During the three year period that this investigation, which was known as the Vegas Project, was in progress, thousands of conversations were seized. Those admitted into evidence in this case were seized during the period from December 30, 1970 to January 20, 1971. The Montreal Police never intended to utilize the wiretap evidence they gathered in a Canadian criminal prosecution. They wiretapped only for intelligence gathering purposes (A. 1557).*

Soon after the wiretapping began, the Montreal Police Force, which does not enforce the narcotics laws in Montreal, suspected that some of the overheard conversations were drug related. One of the targets of the wiretapping, petitioner Frank Dasti, had been suspected of engaging in drug related activities prior to the commencement of the Vegas Project (A. 1567). The Montreal Police contacted Paul Sauve, a member of the Royal Canadian Mounted Police, who are charged with enforcing the narcotic laws in Montreal (A. 1553, 1567). Suave heads

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* Numbers in parenthesis refers to pages in petitioners' appendix in the Court of Appeals.

"the international heroin group" in Montreal. In that capacity, on the basis of an international agreement, he works with the representatives of other nations in a joint effort to stem international narcotics traffic (A. 1548-50, 1572).

After listening to the Vegas tapes and noting that they involve many Americans, Suave notified Agent Kevin Gallagher, the head of the United States Drug Enforcement Administration's Office in Montreal, and asked him to listen to the tapes (A. 1555-56, 1572). Sauve accompanied Gallagher to Quebec Police Headquarters in October, 1970 where Gallagher listened to some of the tapes (A. 1558, 1584-85). Thereafter Gallagher and other American agents went to Quebec Police Headquarters two or three times a week, sometimes more frequently, and listened to, analyzed and discussed the taps, logs and summaries of the tapes with Canadian authorities (A. 1565, 1568, 1586-87). We note hereat that the majority of the calls allegedly involving drug transactions utilized the United States Telecommunications Network, the calls transmitted either between the United States and Canada or Mexico and Canada.

Gallagher made notes and prepared reports based on the information gathered from the Vegas Project. These reports were circulated in the DEA (A. 1589-90). Based on information obtained from the taps, physical surveillance of petitioners and others was conducted in Canada by Gallagher, other American agents, Suave and the Royal Canadian Mounted Police. Surveillances also were conducted by DEA agents in New York and Mexico based on information obtained from the taps (A. 1563, 1569-71, 1593-98). This cooperative Canadian-American effort was undertaken in order to obtain evidence which could be used in a possible narcotics prosecution in the United States (A. 1551-52, 1555-56, 1566, 1594, 1596, 1604).

Gallagher characterized his participation in this cooperative Canadian-American narcotics investigation as an official investigation of the DEA (A. 1598). Suave testified that he and the Royal Canadian Mounted Police were gathering evidence of narcotics activity in Canada in cooperation with the DEA for use in a possible narcotics prosecution in the United States, as well as Canada, pursuant to an international agreement (A. 1552-53, 1566). The Vegas wiretap evidence and its fruits were never utilized in a Canadian criminal prosecution (A. 1564). Petitioners moved pretrial to suppress their use in evidence in this case. After a lengthy hearing the trial court denied the motion, finding that the United States government did not "in any way initiate, supervise, control or direct the wiretapping." The Court of Appeals affirmed (1a-10a). At trial, recordings of seventeen Vegas tapes and summaries of fifteen others were received in evidence, (See table A—app. at 28a-29a). The Court of Appeals noted in its opinion that the wiretap evidence constituted "important corroborative proof" of the government's case (2a-3a).

REASONS FOR GRANTING THE WRIT

I

American involvement in warrantless Canadian wiretapping implicates the Fourth Amendment requiring exclusion of the wiretap evidence in a criminal trial in the United States.

The United States Court of Appeals for the Second Circuit has recognized that aliens who are the victims of warrantless wiretapping conducted by American officials or agents acting on behalf of the United States abroad, may invoke the Fourth Amendment's exclusionary rule in a criminal trial in the United States.

In *United States* v. *Toscanino*, 500 F.2d 267, pet. for. reh. en banc denied, 504 F.2d 1380 (2d Cir. 1974), the court said at 280,

> That the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens is well settled. Reid v. Covert, 345 U.S. 1,77 S.Ct. 1222, 1 L.Ed. 2d 1148 (1957) (Fifth and Sixth Amendments); Balzac v. Puerto Rico, 258 U.S. 298, 312,42 S.Ct. 343, 66 L.Ed. 627 (1922) (due process); Best v. United States, 184 F.2d 131, 138 (1st Cir.), cert. denied, 340 U.S. 939, 71 S.Ct. 480, 95 L.Ed. 677 (1950) (Fourth Amendment.) The government however, while not denying that American citizens may invoke the Fourth Amendment against unreasonable searches and seizures conducted by our government beyond the continental limits of the United States, contends that such rights are not available to aliens who are the victims of such conduct. We disagree. Like the Fifth Amendment guarantee of due process, the Fourth Amendment refers to and protects "people" rather than "areas," Katz v. United States, supra at 353, or "citizens," compare United States v. Pink, 315 U.S. 203, 228, 62 S.Ct. 552, 86 L.Ed. 796 (1942), and Russian Volunteer Fleet v. United States, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931); with Au Yi Lau v. United States Immigration and Naturalization Service, 144 U.S. App. D.C. 147, 445 F.2d 217, cert. denied, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed. 2d 108 (1971). "The Constitution of the United States is in force . . . whenever and whereever the sovereign power of that government is exerted," Balzac v. Puerto Rico, supra at 312-313. It is beyond dispute that an alien may invoke the Fourth Amendment's protection against an unreasonable search conducted in the United States. Au Yi Lau v. United States Immigration

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& Naturalization Serv., supra at 223. No sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States. It is no answer to argue that the foreign country which is the situs of the search does not afford a procedure for issuance of a warrant. As the court pointed out in Best v. United States, supra at 138:

> Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant. If the search is one which would otherwise be unreasonable, and hence in violation of the Fourth Amendment, without the sanction of a search warrant, then in such a case, for lack of a warrant, no search could lawfully be made. 184 F.2d at 138.

In this case the lower court did not disavow this view. Rather it concluded that it need not concern itself with the "taint which might have resulted from American participation in the Canadian taps" because the trial court had found that "the United States government did not 'in any way initiate, supervise, control or direct the wiretapping' and this finding has support in the evidence."

In so holding the lower court applied an incorrect standard to uncontroverted facts in concluding that American participation in the "Vegas Project" was insufficient to make applicable the Fourth Amendment exclusionary rule in this case. The standard applied below is in direct conflict with holdings of this Court and several Circuit Courts concerning the extent of federal participation needed to implicate the Fourth Amendment exclusionary rule in a federal criminal trial.

The primary source of guidance in this area is this Court's decisions defining the "participation doctrine" which was employed before the rejection of the "silver platter doctrine" in *Elkins* v. *United States*, 364 U.S. 206 (1960), to limit the practice of state and local law enforcement officials in turning over to United States agents evidence seized in violation of the Fourth Amendment.

In *Byers* v. *United States*, 273 U.S. 28 (1927) the Court announced that evidence obtained in violation of the Fourth Amendment was inadmissible against an accused in a federal criminal prosecution when obtained by state officials, if the federal government itself, acting through a federal agent, "participated" in the illegal search and seizure. Shortly after the decision in *Byers*, Mr. Justice Brandeis speaking for a unanimous court, recognized in *Gambino* v. *United States*, 275 U.S. 310 (1927) that even where there was no actual "participation" by federal agents in a search conducted by state officers, solely to aid enforcement of a federal statute, the wrongfully seized evidence was nonetheless inadmissible in a federal criminal trial.

The Court said at 316,

> . . . the statement, in the affidavit of one of the troopers, that at the time of the arrest and search "there were no Federal officers present and that we were not working in conjunction with Federal officers" must be taken to mean merely that the specific arrest and search was not directly participated in by any Federal officer.
>
> We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the 4th and 5th Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evi-

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> dence of guilt. It is true that the troopers were not shown to have acted under the directions of the Federal officials in making the arrest and seizure. But the rights guaranteed by the 4th and 5th Amendments may be invaded as effectively by such co-operation, as by the state officers acting under direction of the Federal officials.

Later decisions in various circuits extended *Gambino's* exclusionary rule to evidence seized by state officers in contemplation of possible federal use even though the state officers also contemplated use of the seized evidence in a state prosecution. *Lowrey* v. *United States*, 128 F.2d 477 (8th Cir. 1942); *Sutherland* v. *United States*, 92 F.2d 305 (4th Cir. 1937); *Fowler* v. *United States*, 62 F.2d 656 (7th Cir. 1932). In all of these cases the evidence disclosed that federal prohibition officers and local law enforcement officials cooperated in making investigations of violations of the State and National Prohibition Acts. If the amount of liquor obtained in any case was small the prosecution would be instituted under the local laws, but, if the amount of liquor was large, the federal authorities would have the option of taking over the prosecution. In all of the cases, the state officers did not notify the federal authorities in advance of an illegal search and seizure and no federal officers actually participated in the searches. Still, in light of the policy of general co-operation between the state and federal officers, where the federal officers adopted a prosecution which the state officers had begun as a result of an illegal search and seizure, the evidence seized was ruled inadmissible in a federal criminal trial. In *Sutherland* v. *United States*, *supra*, the court said at 307-08,

> But we think that, where the state and federal officers have an understanding that the latter may prosecute in the federal courts offenses which the former discover in the course of their operations, and where the federal officers adopt a prosecution

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> originated by state officers as the result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the federal officers themselves or under their direction. Gambino v. United States, 275 U.S. 310, 48 S.Ct. 137, 138, 72 L.Ed. 293, 52 A.L.R. 1381. It is true that in the Gambino Case it is stated that the "wrongful arrest, search and seizure were made solely on behalf of the United States"; but we do not think that this is sufficient to distinguish that case from this, where there was general co-operation between state and federal officers and where the federal officers in fact adopted the prosecution which the state officers had begun as a result of their search. It is the fact that there was such co-operation and adoption and not the fact that the search was made solely in behalf of the United States which in our opinion is the determining factor; for, whether the arrest, search, and seizure be made solely on behalf of the United States or not, it remains true that "the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under direction of the federal officers."

Similarly, in *Lustig* v. *United States*, 338 U.S. 74 (1949), local police informed a United States Secret Service agent of suspected counterfeiting violations. He investigated the location, a hotel room, without entering. On his suspicions that there might be state law violations occurring in the room, the local police obtained an arrest warrant for the two men registered in the room. The state police entered the room, in the absence of the suspects, and conducted a search. The federal agent was not with them at this time. After finding evidence of a counterfeiting operation the police called the Secret Ser-

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vice agent to join in the examination. When the occupants returned they were placed under arrest and later were convicted of counterfeiting. On these facts, and despite the limited participation by the federal officers in the search, the court held that this was a federal search, and that since the requirements of the Fourth Amendment were not met, the evidence seized should not have been received in the federal court.

Writing the prevailing opinion in *Lustig* for himself and three other members of the Court, Justice Frankfurter said of *Byars*.

> The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applicability of the Byars Case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers.

338 U.S. at 78-79.

In *Euziere* v. *United States*, 266 F.2d 88 (10th Cir. 1959) the court said at 90,

> The test in all cases is did the federal authorities participate in any way in the search? . . . If by tacit agreement of by a course of conduct, it is

> understood or becomes apparent that the result of a search by state officers is to be turned over to the federal agents, then they participate in the search as fully as though they actively participated therein.

Justice Frankfurter dissenting from this Court's rejection of the silver platter doctrine in *Elkins* v. *United States, supra*, explained that under the "participation doctrine", the "question has always been whether the offending search or seizure was conducted *in any part* by federal officers or in the interest of the Federal Government, or whether it was conducted *solely* by state officers acting exclusively for state purposes". 364 U.S. at 236 (emphasis added). The *Elkins* majority did not quarrel with Justice Frankfurter's statement of the true limits of that doctrine.

Since the decision in *Elkins*, the standards announced in *Byers*, *Gambino*, *Lustig*, and their progeny have been employed outside the Second Circuit to determine whether there was federal participation in a search conducted by state officers in violation of the provisions of Federal Rules of Criminal Procedure, Rule 41, so as to constitute a "federal search" and render its product inadmissible in a federal criminal trial. *United States* v. *Hanson*, 469 F.2d 1375 (5th Cir. 1972); *Navarro* v. *United States*, 400 F.2d 315 (5th Cir. 1968); *United States* v. *Passero*, 385 F. Supp 654 (D.C. Mass. 1974); *United States* v. *Perez*, 375 F. Supp. 332 (D.C. Tex. 1974); *United States* v. *Carney*, 356 F. Supp. 855 (D.C. Tenn. 1973); *United States* v. *Pechac*, 54 F.R.D. 187 (D.C. Ariz. 1972); *United States* v. *Elliott*, 210 F. Supp. 357 (D.C. Mass. 1962).

Application of these standards to the uncontroverted facts in this case compel the conclusion that there was more than sufficient American participation in the "Vegas

Project" to make applicable the Fourth Amendment exclusionary rule to the evidence obtained through warrantless wiretapping.

It is indisputable that American agents pursuant to a pre-existing international agreement participated with Canadian authorities in the narcotics investigation aspect of the "Vegas Project." DEA agents listened to and analyzed the Vegas tapes on an almost daily basis, while the investigation was in progress. This practice began in October, 1970, two to three months prior to the recording of the petitioner's conversations which were received in evidence and continued throughout the life of the investigation. In furtherance of the investigation D.E.A. agents and Canadian officials jointly surveilled petitioners and others in Canada. The D.E.A. and the Canadians freely exchanged whatever information each obtained in the course of this joint endeavor which was admittedly pursued to gather evidence for use in a possible narcotics prosecution in the United States. The Quebec Police instituted the wiretapping solely to gather intelligence, and never intended to utilize the wiretap evidence in a Canadian criminal proscution. The only in court use made of the wiretap evidence has been in this case. Surely, these facts compel the conclusion that the "Vegas Investigation" and the wiretapping which was an intrinsic part of it was not conducted exclusively for Canadian purposes. Within the meaning of *Gambino* and *Lustig*, American agents "joined" the investigation, and "had a hand in 'the wiretapping' before its conclusion," thus, requiring exclusion of the wiretap evidence in this case.

II

The interception of wire communications herein over the United States Telecommunication Network, through joint American-Canadian participation—without compliance with 18 U.S.C. § 2510 et seq., required exclusion of all wiretap evidence at a criminal trial in the United States.

Those same concepts of participation by the United States and Canadian Governments in obtaining evidence through the use of electronic surveillance (the Vegas projects), as indicated herein immediately above, violated equally the mandates of 18 U.S.C. § 2510 et seq. (Title III), the legislative scheme enacted by Congress both to protect the privacy of individuals and to provide a controlled method of electronic surveillance under specific conditions.

Senator McClellan, one of the leading proponents and drafters of Title III stated in Congress, concerning the legislation on August 11, 1969, inter alia:

> "* * * Nevertheless, more was involved in (the) fight (to secure enactment of Title III) than an attempt to strengthen the hand of law enforcement. Each of us who worked so long and hard for Title III had as an equally important goal: the protection of the privacy of the law abiding citizen."
>
> *Cong. Record, Vol. 115*, No. 136, p. 1.

As this Court held, inter alia, in *Gelbard* v. *United States*, 408 U.S. 41, 47, concerning Title III:

> "Title III authorizes the interception of private wire and oral communications, but only when law enforcement officals are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon com-

> pliance with stringent conditions. * * * Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited."

The Government has conceded at trial that there was no attempt, in the instant case, to comply with the requirements of Title III.

Even the restricted number of intercepted conversations supplied by the prosecution in this case clearly shows that the majority of those conversations introduced in evidence at the trial utilized the United States Telecommunication Network. Thirteen (13) of the intercepted conversations were between New York and Canada; six (6) were between Mexico and Canada. As trial evidence revealed, telephone conversation between New York and Canada, as wll as Mexico and Canada, utilized the United States Telecommunication Network.

In *United States* v. *Toscanino*, *supra*, that Court held, *inter alia:*

> "* * * We agree with the Government that the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, *et seq.*, has no application outside of the United States. The term 'wire communication,' as used in the statute, 18 U.S.C. § 2510(1) is intended to refer to communications 'through *our Nation's* communication network.' *See*: 1968 U.S. Code Cong. & Admin. News,

Reference to the terms of the statute, itself, makes clear that any interference with an international communication utilizing our telecommunication network is subject to the terms of 18 U.S.C. § 2510, *et seq.* Thus, § 2510 set forth, *inter alia*, the following definition:

> "(1) 'wire communication' means any communication made in whole *or in part* through the

use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate *or foreign communications;*

* * * * *

"(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

"(11) 'aggrieved person' means a person who was a party to any intercepted or oral communication or a person against whom the interception was directed."

The very language of the statute makes obvious the Congressional awareness that the United States communication network is inextricably woven into conversations which are international in nature as well as domestic. And also obvious from the wording of the statute is that the Congressional intent was to regulate the interception and subsequent evidentiary quality of any and all calls utilizing the United States telecommunications network.*

Section 2511(a) makes it a crime for *any person* to intercept any wire communication, and § 2511(c) makes it a crime for *any person* to disclose any such intercepted communication. Any person, by statutory definition includes a government official [2510(7)].

* The statute which preceded § 2510 *et seq.*, to wit, former § 605 of the Federal Communications Act (47 U.S.C. § 605), provided similarly against the interception and divulgence of *foreign* as well as domestic communications.

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Section 2515 is a statutory exclusionary rule applicable to intercepted communications:

> "Section 2515. Prohibition of use as evidence of intercepted wire or oral communications.
>
> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be recived in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

It would be pointless to catalog the numerous violations of 18 U.S.C. § 2510 which were involved in the interception and disclosure of the telephone conversations in the present case. The program of wiretapping in this case was violative of and disregarded every rational safeguard written into the statute to protect the privacy of telephone conversations.

Our contentions in this regard are buttressed by several factors. The "silver platter" doctrine, repudiated in *Elkins* v. *United States*, *supra*, condemned use by the Federal Courts of evidence obtained in a manner illegal under Federal standards. Is not the "Silver Platter" doctrine in play in the instant case on an international level; is the condemned evidence herein any less contemptible? Any holding to the contrary would create a great likelihood of injustice. International telephone communications, particularly between the United States and Canada, number in the millions each year. If such communications could be intercepted by the law enforcement authorities of each country and turned over to the law enforcement authorities of the other country, without fear that either country's regulatory statutes

would apply, then there would be absolutely no regulation of international wiretaps. Moreover, precisely as was the case here, our courts would have no power to command the production of any of the fruits of wire taps conducted in a foreign country.

In *Lee* v. *Florida*, 392 U.S. 378, this Court considered the application of § 605 to the circumstances of a case much like the instant one. In *Lee*, the petitioner was issued a telephone on a four party line. A week later, at the direction of the Orlando (Florida) Police Department, the telephone company connected a telephone in a neighboring house to the same party line. The Police attached to this telephone an automatic articulator, a tape recorder, and a set of earphones. The Police in that case could hear and record all conversations on the party line without the necessity of lifting the receiver on their own telephone. At the petitioner's trial several of these recordings were introduced in evidence by the prosecution over objection of defense counsel. The Supreme Court held:

> "For here the police * * * deliberately arranged to have a telephone connection to [appellant's] line without his knowledge, and they altered that connection in such a way to permit continuous surreptitious surveillance and recording of all conversations on the line. * * * The conduct of the Orlando Police, deliberately planned and carried out, clearly amounted to interception of the petitioner's communications within the meaning of § 605 of the Federal Communications Act. (392 U.S., at 381-2).
>
> " * * * [I]n *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 6, 2 L.Ed. 2d 19, * * * the Court returned to the teaching of *Nardone* [*Nardone* v. *United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314] in giving emphatic recognition to the language of the statute that itself makes illegal the divulgence of intercepted communications. In

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> *Benanti*, the Court held inadmissible in a federal trial communications that had been intercepted by State officers. '§ 605', the Court said, 'contains an express absolute prohibition against the divulgence of intercepted communications' 355 U.S., at 102, 78 S.Ct. at 159' (329 U.S., at 384).
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> * * * * *
>
> "But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'. *Elkins* v. *United States*, 364 U.S. 206, 222. Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the laws of the United States', laws by which 'the Judges in every State [are] bound * * *.'
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> * * * * *
>
> "We conclude as we concluded in *Elkins* and in Mapp that nothing short of mandatory exclusion of illegal evidence will compel respect for the federal law 'in the only effective available way—by removing the incentive to disregard it.' *Elkins* v. *United States*, 364 U.S. at 217, 80 S.Ct. at 1444" (392 U.S. 378 at 387).

This Court's condemnation in *Lee* v. *Florida*, *supra*, is equally compelling in the instant case; the imperative of judicial integrity requires the exclusion of the wiretap evidence obtained through the purposeful joint venture of the American and Canadian officials herein.

The Government should not be permitted to argue that the seizures herein are not excludible because the actual "smoking pistol" was in the hands of Canadian officials who are not subject to the personal penal and civil sanctions of Title III. In the first instance, this argument is defective, for had American agents actually manned recording machines, without the aid of Canadian officials, to intercept conversations at the foreign end of a com-

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munication between the United States and a foreign jurisdiction, just to avoid the prohibitions of Title III, this Court would have no hesitation to exclude and condemn evidence obtained thereby. In the instant case, the American agents, long before the conspiracy alleged herein, were aware of the Canadian wiretaps and the content thereof, were aware that the information might be used in connection with an American prosecution for narcotics transported to the United States, were aware of the actual identity and residence of American citizens being intercepted on conversations between the United States and Canada, and were actually surveilling people in the United States based upon the information so obtained. Yet, while American agents were physically surveilling these individuals, the agents were content not to obtain authorization for surveillance of these telephone conversations of these same people on the American end of the wire, and were fully content to permit the Canadian officials, with joint cooperation and sharing of the information and evidence derived, to man the machines on behalf of and in cooperation with the American government.

The issue herein is not whether Canadian officials can, as a practical matter, be prosecuted. The essence of Title III is the integrity of communications and of the Federal Judicial Process. Since the very revelation in the courtroom constitutes a violation of the privacy value—the primary objective of the statute—sought to be protected by former § 605 of the Federal Communications Act and by the present Title III, the remedy mandated by Congress is the exclusion of evidence so obtained. The integrity of the judicial process requires no less, *Lee* v. *Florida*, *supra*.

It is difficult to resist noting that if basic rules applicable to conspiracy prosecutions were applied to the government's relationship to the illegal wiretapping herein, there would be little doubt that a finding would be more than justified that the government participated in

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the wiretapping scheme. As so frequently has been held, once the existence of a conspiracy is established, "only evidence which, viewed alone, is of relatively slight import, is needed to connect each conspirator with it." *United States* v. *Pardo-Bolland*, 348 F.2d 316 (2d Cir., 1965), *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir., 1965). We respectfully urge that an evenhanded administration of justice requires the application of that very same rule to the government, particularly where as here the evidence of the government's participation is hardly of "slight import."

CONCLUSION

In this era of burgeoning international criminal investigations, this Court's guidance is needed to inform federal agents operating abroad of their obligation to comply with applicable Fourth Amendment standards in investigations conducted jointly with agents of foreign governments. Additionally, the direct conflict between the standard for determining "federal participation" applied by the Second Circuit in this case with the standards announced by this Court in *Byers*, *Gambino* and *Lustig*, and the decisions of various other circuit courts require resolution.

For the foregoing reasons petitioners respectfully request that the petition for certiorari be granted.

Respectfully submitted,

JOHN NICHOLAS IANNUZZI
Attorney for Petitioner
Frank Cotroni

NANCY ROSNER
Attorney for Petitioner
Frank Dasti

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APPENDIX A

Opinion of the Court of Appeals (December 22, 1975)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1179, 1180 September Term, 1974

(Argued August 13, 1975 Decided December 22, 1975)

Docket Nos. 75-1118, 75-1156

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COTRONI and FRANK DASTI,

Appellants.

Before: GURFEIN, VAN GRAAFEILAND and MESKILL, *Circuit Judges.*

Appeal from judgments of conviction for conspiring to import cocaine and for the receipt and concealment of nine kilograms of cocaine, after a jury trial before Jacob Mishler, *Chief Judge*, United States District Court for the Eastern District of New York.

Affirmed.

John Nicholas Iannuzzi, New York, N.Y. (Henry J. Boitel, New York, N.Y., of counsel), *for Appellant Frank Cotroni.*

Michael N. Klar, New York, N.Y. (Henry J. Boitel, New York, N.Y., of counsel), *for Appellant Frank Dasti.*

David G. Trager, United States Attorney for the Eastern District of New York (Edward R. Korman, Chief Assistant United States Attorney, of counsel), *for Appellee.*

Appendix A—Opinion of the Court of Appeals (December 22, 1975)

VAN GRAAFEILAND, *Circuit Judge*:

In this saga of international crime, we are met once again with the contention that evidence obtained by foreign authorities in a manner which does not comport with our country's constitutional and statutory requirements should be excluded. The evidence here came from Canadian wiretaps placed by that country's police without judicial authorization such as is required by Title III of the Omnibus Crime Control Act of 1968. 18 U.S.C. § 2510 *et seq.* We agree with the trial court that the evidence was admissible, and we affirm the judgments appealed from.

Frank Cotroni and Frank Dasti, Canadian citizens, were convicted after a jury trial in the Eastern District of New York of conspiracy to import cocaine into the United States for the purpose of sale [1] and also for receiving, concealing and facilitating the transportation and concealment of nine kilograms of cocaine.[2] The cocaine originated in Mexico and ended up in the hands of the notorious Bynum drug ring in New York City. *See United States* v. *Bynum*, 485 F.2d 490, 493-94 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 903 (1974), *rehearing on remand*, 386 F. Supp. 449 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 533 (2d Cir. 1975).

Much of the evidence leading to appellants' convictions came from the testimony of co-conspirators, buttressed by hotel and airline records and police surveillance reports. However, important corroborative proof was also provided by summaries and transcripts of thirty-two wire-

1. 21 U.S.C. §§ 173, 174 (1964). Repealed by Act of October 27, 1970, P.L. 91-513, Title III, § 1101(a)(2)(4), 84 Stat. 1291. The repealer does not affect this case because the crime occurred prior thereto.

2. 21 U.S.C. §§ 173, 174 (1964) (repealed, *see* note 1 *supra*) and 18 U.S.C. § 2.

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taps furnished the prosecution by Canadian police. Canadian wiretapping had commenced in July 1970 as part of a general gambling investigation, and taps were placed at both the homes and the social club of appellants. During the three-year period that this investigation was in progress, thousands of conversations were intercepted. Those involving the drug conspiracy of appellants were secured in December 1970 and January 1971. Appellants contend that this was done in violation of the laws of both the United States and Canada. Following a suppression hearing, the District Court rejected this contention.

Chief Judge Mishler found that, prior to the enactment of the Canadian Protection of Privacy Act [3] in 1974, no law of that country outlawed wiretapping. The statutes in existence in 1970 and 1971 [4] were intended to protect telephone service and equipment, not to prevent the interception of communications in connection with a lawful police investigation. Chief Judge Mishler also held that the Protection of Privacy Act, which contained an exclusionary rule [5] similar to that of Title III, did not apply retroactively. Chief Judge Mishler's findings had ample support in the decisions of the Canadian courts.[6] Indeed the correctness of such findings has since been confirmed in Canada in an action brought by the wife

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3. Martin's Criminal Code §§ 178.1-§§ 178.23 (1974).

4. An Act to Incorporate the Bell Telephone Company of Canada § 25 (Statutes of Canada, 1880, Ch. 67), Martin's Criminal Code § 287; The Quebec Telegraph and Telephone Companies Act § 24 (Revised Statutes of Quebec, 1964, Ch. 286).

5. Martin's Criminal Code § 178.16 (1974).

6. *Re Copeland and Adamson* (1972) 7 C.C.C. (2d) 393, 399-400 (Ontario High Court of Justice); *Regina* v. *Demeter*, (1975) 19 C.C.C. (2d) 321 (Ontario High Court of Justice); *Regina* v. *Desjardins*, No. 74-9150, The Queen's Court (Criminal Division) Quebec, October 18, 1974.

of appellant Dasti involving the same wiretaps at issue herein.[7]

The District Judge also held that, although the intercepted telephone conversations traveled in part over our country's communication system, their introduction into evidence was not proscribed by Title III. In so doing, he relied largely on our decision in *United States* v. *Toscanino*, 500 F.2d 267, 279 (2d Cir. 1974), where we said that "the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, et seq., has no application outside of the United States." Appellants would distinguish *Toscanino* because of the partial use in the instant case of United States communication facilities, relying for this argument on the definition of "wire communication" contained in 18 U.S.C. § 2510(1).[8] We think this reliance is misplaced. Congress sought by Title III to regulate interceptions, not wire communications. *See* Act of June 19, 1968, P.L. 90-351, § 801(a)-(d), 82 Stat. 211. Thus, it is not the route followed by foreign communications which determines the application of Title III; it is where the interception took place. Section 2511 prohibits the willful interception of communications and the willful disclosure of the contents of communications wrongfully intercepted. The former triggers the latter and forms

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7. *Dasti* v. *Patenaude*, Court for Sessions of the Peace, Quebec, December 23, 1974, *petition for mandamus denied sub nom. Dasti* v. *Durlanleau*, Superior Court (Criminal Division) Quebec, March 27, 1975.

8. 18 U.S.C. § 2510(1) provides:

> "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. . . .

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the entire basis for the evidentiary rule of exclusion found in 18 U.S.C. § 2515.

Our holding in *Toscanino* comports with the canon of construction which teaches that, unless a contrary intent appears, federal statutes apply only within the territorial jurisdiction of the United States. *Foley Brothers* v. *Filardo*, 336 U.S. 281, 285 (1949); *Air-Line Stewards and Stewardesses Association International* v. *Trans World Airlines, Inc.*, 273 F.2d 69, 70 (2d Cir. 1959) (per curiam), *cert. denied*, 362 U.S. 988 (1960).[9] The District Court's interpretation of Title III does likewise.

Appellants' arguments for exclusion receive no greater support from the United States Constitution. Appellants' rights vis-a-vis their own government are not defined by the provisions of the United States Constitution and are therefore "no legal concern of an American court." *Wentz* v. *United States*, 244 F.2d 172, 176 (9th Cir.), *cert. denied*, 355 U.S. 806 (1957). Accordingly, information furnished American officials by foreign police need not be excluded simply because the procedures followed in securing it did not fully comply with our nation's constitutional requirements. The absence of *Miranda* warnings may be overlooked, *United States* v. *Welch*, 455 F.2d 211 (2d Cir. 1972) (per curiam); *United States* v. *Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), and the lack of a proper search warrant may be disregarded. *Birdsell* v. *United States*, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965); *Stonehill* v. *United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *Brulay* v. *United States*, 383 F.2d 345, 347-48 (9th Cir.),

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9. In *Toscanino*, 500 F.2d at 279-80, we pointed out that 18 U.S.C. § 2518 "significantly makes no provision for obtaining authorizations for a wiretap in a foreign country."

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cert. denied, 389 U.S. 986 (1967). The exclusionary rule is intended to inculcate a respect for the Constitution in the police of our own nation. *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). Since it has little if any deterrent effect upon foreign police, *see United States* v. *Welch*, *supra*, 455 F.2d at 213, it is seldom used to bar their work product.[10]

We need not concern ourselves with taint which might have resulted from American participation in the Canadian taps. *See Stonehill* v. *United States*, *supra*. Chief Judge Mishler found that the United States government did not "in any way initiate supervise, control or direct the wiretapping," and this finding has support in the evidence.

Appellant's remaining complaints about the wiretap evidence merit but passing comment. The failure of the Canadian police to keep complete transcripts of the thousands of conversations recorded over a three-year period did not require the exclusion of the thirty-two which were offered in evidence. The Canadian taps were being used to gather information about gambling; and, as the District Court found, the Canadian officials, in good faith, discarded those tapes which were non-informative. *See United States* v. *Augello*, 451 F.2d 1167, 1170 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972). Appellants have made no showing that those which were destroyed were relevant to the drug conspiracy herein involved or contained any exculpatory material. Moreover, appellants have come forth with no valid reason for charging the prosecution with the acts of the Canadian authorities. An adverse inference may not be drawn from the destruction of evidence without some showing of control. *Imperial*

10. Were the conduct of foreign police so reprehensible as to shock the conscience, a different result might obtain. *United States* v. *Nagelberg*, *supra*, 434 F.2d at 587 n.1.

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Commodities Corp. v. *Grace Line, Inc.*, 517 F.2d 404, 409 (2d Cir. 1975).

We likewise see no error resulting from appellants' inability to review the wiretap recordings still in the possession of Canadian police. The prosecution cannot be charged with wrongdoing for failure to permit inspection of recorded statements not "within the possession, custody or control of the government." Fed. R.Crim.P. 16(a)(1)(A); *United States* v. *Atkinson*, 512 F.2d 1235, 1239 (4th Cir. 1975); *United States* v. *Birrell*, 276 F. Supp. 798, 824 (S.D.N.Y. 1967); *United States* v. *Kaskel*, 18 F.R.D. 477, 481 (E.D.N.Y. 1956).

Judge Mishler's refusal to go to Canada and review the records accumulated during three years of wiretapping, none of which was subject to his jurisdiction or control, was not erroneous. There must be some limit to what can be demanded of our conscientious District Court judges in the expeditious handling of criminal trials which our laws demand. Appellants have made no showing that Judge Mishler's inspection would have been fruitful, and we see no abuse of discretion.

We do not understand why the Government felt it necessary to introduce tapes of conversations between appellant Dasti and his wife, since they added little, if anything, to the substantial evidence of guilt otherwise before the jury. This "last nail in the coffin" type of testimony often brings disaster to the overly-thorough advocate. However, we find that in this case the conversations were innocuous and harmless.[11] We therefore do not

11. Of the twenty-four conversations introduced at trial to which Dasti was a party, only four involved his wife. In the first, Dasti tells his wife to pack her bags for a trip to New York City. In the others, reference is made to the arrival of "the Americans" with money. These material facts were disclosed by other, clearly admissible evidence.

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reach the question of whether they were admissible because of their routine, non-confidential nature, *United States* v. *Mitchell*, 137 F.2d 1006, 1009 (2d Cir. 1943), or because both spouses were participants in patently illegal activity. *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

Appellants' only claim of error unrelated to the wiretaps concerns the proof offered by the government to link appellants' narcotics dealings with those of the Bynum ring. The Assistant United States Attorney who prosecuted did not learn of this connection until shortly before the commencement of trial. In view of the District Court's consequent offers of adjournment to appellants, we see no error resulting from this delayed enlargement of the scope of the alleged conspiracy. *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974).

Testimony that Bynum was using the cocaine purchases as a forerunner to subsequent dealings in heroin, admitted without objection, did not warrant the granting of appellants' subsequent motion for mistrial. The court instructed the jury that this testimony was admitted only on the issue as to whether appellants entered into the conspiracy for the cocaine, as charged in the indictment, knowingly and willfully and that, if the jury didn't think it was pertinent on that issue, it should disregard it. We see no prejudicial abuse of discretion in its admission. *United States* v. *Braverman*, 376 F.2d 249, 252 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967).

After full consideration of all of appellants' contentions, we see no error. The judgments of conviction are affirmed.

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APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of December one thousand nine hundred and seventy-five.

Present: HON. MURRAY I. GURFEIN
HON. ELLSWORTH VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges,

75-1118

75-1156

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRANK COTRONI, FRANK DASTI, GUIDO ORSINI, PAUL ODDO, JORGE ASAF & BALA, CLAUDIO MARTINEZ,
Defendants,
FRANK DASTI, FRANK COTRONI,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

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Appendix B—Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

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APPENDIX C

Memorandum of Decision and Order, January 10, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 CR 898

UNITED STATES OF AMERICA

—against—

FRANK COTRONI and FRANK DASTI,

Defendants.

Defendants seek to suppress as evidence telephone conversations in which they were parties that were seized by the Special Investigation Unit of the Quebec Police Force during the period from December 30, 1970 to January 20, 1971. The government intends to offer seventeen such telephonic conversations, copied from original tapes of the conversations made simultaneously on an automatic recording device. Fifteen of these tapes are recordings of conversations which occurred between parties in Canada and New York, and Canada and Mexico. In ten of the conversations, co-defendant Paul Oddo called defendant Dasti from New York.[1] In another conversation Dasti called Cotroni from New York.

In July 1970, Herbe Patenaude, Director General, had taps placed on the pay telephone and private business telephone of the Victoria Sporting Club after his office received numerous complaints of illegal gambling from irate housewives who told of their husband's losses in

[1] The trial of co-defendant Oddo was ordered severed before commencement of the present trial.

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gambling at the Victoria Sporting Club. These charges were supported by reports of surveilling officers. Patenaude determined that conventional investigative procedures were unlikely to succeed, and thereupon directed Claude LaVelle, a member of the Quebec Police Force, to install the taps.

The intercepted conversations gave Patenaude probable cause to believe that other telephones in Montreal were being used to carry on illegal gambling and narcotics trafficking. At this point, Patenaude directed that taps be placed on Cotroni's home telephone, Dasti's home telephone and the public telephone in the lobby of the Laurentien Hotel, as well as others—all in Montreal.[2] Bernard Couture, a member of the Quebec Police Force was assigned to listen to all the tapped conversations. In accordance with his instructions, Courture discarded (or erased) irrelevant conversations, and placed the conversations relevant to the subject matter on a "dub", or master tape, by electronically copying the originals. Subsequently, these original tapes were erased and reused. None of the relevant conversations were cut, altered or edited. Only complete conversations are offered.

Defendants assert the following grounds for suppression:

1. Interception of telephonic communications was illegal in Canada prior to June 30, 1974;

2. Evidence procedured through telephone interception prior to June 30, 1974, is presently inadmissible under Canadian law;[3]

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[2] In addition to the two taps on the Victoria Sporting Club, taps were placed on the phones of Frank Dasti, the Laurentien Hotel, the Salon Pierre, Santo Mendolia and G. (Vido) Orsini.

[3] It is conceded that prior to June 30, 1974, illegality in the method of obtaining evidence did not affect its admissibility. *R.* v. *Steinberg*, 10.R.733 (1967), 3 CCC 48.

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Appendix C—Memorandum of Decision and Order, January 10, 1975

3. Title III of the Omnibus Crime Control and Safe Streets Act (Pub. L. 90-351, 18 U.S.C. §§ 2510 *et seq.*) bars the use of all evidence obtained in violation of its provisions, or alternatively bars the use of those conversations in which a portion of the interstate telephonic system is used, *i.e.*, telephone conversations between Canada and New York or Mexico.

A fourth assertion, not specifically set forth as a ground for suppression, is that the seizures were illegal because agents of the United States government participated in the illegal seizures and utilized them subsequently. This claim is (presumably) founded on *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). The claim of participation by United States agents in the wire taps is based on the following:

In September, 1970, Kevin Gallagher, special agent of the Drug Enforcement Administration, was assigned to the investigation of the activities of the defendants and others engaged in the international trafficking of narcotics, which is jointly pursued by many nations including the United States and Canada. Gallagher contacted his Canadian counterpart, Staff Sargeant Paul Sauve, of the Royal Canadian Mounted Police. Sgt. Sauve provided Gallagher with information obtained from the wiretaps concerning the defendants' narcotics related activities. Gallagher was present when Sauve continued surveillance in Montreal. Later, Gallagher used some of the information obtained from the wiretaps in his surveillance of the activities of the co-conspirators in New York. Gallagher also listened to the subject tapes.

Apart from Gallagher's activities, the United States government took no part in the investigation whatsoever.

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The United States government did not in any way initiate, supervise, control or direct the wiretapping. It did not supply any equipment or funds. It did not supply any leads. This government had no role in the investigation except the exchange of information. There is no basis for defendants' claim of illegal activity on the part of the United States government. *See United States ex rel. Lujan* v. *Gengler*, 74-2084 (2d Cir. January 8, 1975) explicating *United States* v. *Toscanino, supra.*

CANADIAN WIRE TAP LAW PRIOR TO JUNE 30, 1974

The Canadian Criminal Code was amended on June 30, 1974 with the passage of the Protection of Privacy Act (Sections 178.1 to 178.23, Canadian Criminal Code) providing for criminal sanctions for the willful interception of "private communications", including telecommunications. The Protection of Privacy Act parallels Title III and contains a similar series of procedures providing for lawful interception. As under Title III evidence obtained directly or indirectly from unauthorized interceptions is barred under Section 176.16.[4] Defendants concede that

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[4] Section 178.16(1) provides:

> "a private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof."

Similarly, 18 U.S.C. § 2518(10)(a) gives the aggrieved person the right to suppress the contents of an unlawfully intercepted telephonic communication.

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prior to June 30, 1974, there was "no law of Canada outlawing wiretapping, as such", but advance the claim that "wiretapping violated the criminal statutes and thus rendered it unlawful." The statutes cited in support of this argument [5] are all clearly designed to protect telephone

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[5] (1) "AN ACT TO INCORPORATE THE BELL TELEPHONE COMPANY OF CANADA" (1880, STATUTES OF CANADA. ch. 67, Section 25)

25. Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts or other materials or property of the Company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon, shall be guilty of a misdemeanor.

(a) Section 287 OF THE CRIMINAL CODE—present Code (in force in 1971)

THEFT OF TELECOMMUNICATION SERVICE—"Telecommunication."

287.(1) Every one commits theft who fraudulently, maliciously, or without colour of right,

(a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted, or

(b) uses any telecommunication wire or cable or obtains any telecommunication service.

(2) In this section, "telecommunication" means any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire or cable. 1960-61, c. 43. s.6.

(b) Section 273 OF THE CRIMINAL CODE—Code of *1960.*

THEFT OF SERVICES.

273. Every one commits theft who fraudulently or maliciously

(a) abstracts, consumes or uses electricity or causes it to be wasted or diverted, or

(b) uses a telephone or telegraph line or obtains telephone or telegraph service.

THE QUEBEC TELEGRAPH & TELEPHONE COMPANIES ACT—

[Footnote continued on following page]

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services and equipment. It is apparent that these statutes are not designed or intended to protect the privacy of the telephone conversation, except to the extent that they protect the business of Bell Telephone. Thus, the theft of services statutes cited by defendants were clearly intended to cover uncompensated use of utility services, not wiretapping. The only statute cited that refers to the interception of communications is Section 25 of the Act to Incorporate the Bell Telephone.[6] In the context of that statute "intercept" means a disruption of the communication—a failure of the intended receiver to receive the message, *Re Copeland and Adamson*, 7 C.C.C. (2d) 393, 400 (Ontario High Court of Justice, 1972). The broader meaning assigned to the word "intercept" under the Protection of Privacy Act and federal anti-wiretapping statutes (47 U.S.C. § 605; 18 U.S.C. § 2510(4)) was not meant or intended in the Bell Act.[7] Defendants would

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(Revised Statutes of Quebec, 1970, ch.286, s.23-24)

24. Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system, not addressed to or intended for such person, and divulges the same or the purport or substance thereof, except when lawfully authorized or directed to do so, shall be liable to the same penalty and imprisonment as are created in section 23.

[6] The court finds a significant absence of any statute for the protection of privacy from any electronic surveillance prior to June 30, 1974. This further indicates that the statutes cited did not intend criminal sanctions to discourage invasion of privacy.

[7] The court in *Re Copeland and Adamson* rejected the claim made here in the following language:

> "I do not believe that wiretapping which does not impede the conversation between the parties nor impede its progress can form a breach of such section [Section 25 of An Act to Incorporate the Bell Telephone Company of Canada, 1880 c 67] because the material before me does not indicate that the audio surveillance creates any disturbance of the conversation." *Id.* at 400.

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have this court rule that the presence of the term "intercept" in the statute requires that the statute be given an interpretation contrary to its intended use. The answer to this suggestion is found in the words of Judge Learned Hand, in *Federal Deposit Insurance Corp.* v. *Tremaine*, 133 F.2d 827, (2d Cir. 1943) where he said:

> "There is no surer guide in the interpretation of a statute than its purpose when it is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it."

Furthermore, it is not clear that even if the Bell Act were violated, the violation would be a crime. The Act Incorporating the Bell Telephone was provincial legislation which . . . "provides a penalty [but] does not necessarily bring it within the category of criminal law (citations omitted)." *Regina* v. *Chapman and Grange*, 11 C.C.C. (2d) 20 C.R.N.S. 141, 156. The Act authorizing incorporation was not part of the statutory criminal law.

The other statute upon which defendants rely and which has some possible relevance to their claim is section 24 of the Quebec Telephone and Telegraph Companies Act. Again, however, the purpose of this statute is to protect property, not the right to privacy. Furthermore, several decisions have clearly held that police officers who engage in wiretapping while performing their lawful duties and in pursuance of their investigative function, did not violate such statutes. *In Re Copeland and Adamson, supra; Regina* v. *Pearson*, 66 Western Weekly Reports 380, *Her Majesty the Queen* v. *Barton Roy Lesarge* (Gen. Sessions of the Peace, District of York, Sept. 23, 1974). It is not necessary to decide whether these decisions were based on the

theory that the class described in the various statutes excludes police officers in the pursuance of their duties, or that acts of police officers in the pursuance of their duties lack the requisite criminal intent. In either case, this court finds that the Quebec Police, who had probable cause to wiretap and followed their established procedures prior to initiating the wiretap, did not violate this or any other law in so doing. Defendants' reliance on *Regina* v. *Chapman and Grange, supra,* is misplaced. This court is convinced that the finding of unlawful conduct in that case was based on the purpose and nature of the wiretap in question. In that case, Chapman, a member of the police force, installed a wiretap on a labor union telephone at the direction of Grange, his employer, who was engaged in strike breaking activities. The facts clearly demonstrate that Chapman was working for a private employer, and was not acting in his official capacity. The court's statement that Chapman was a "plain clothes detective" was irrelevant to the decision.

The wiretap evidence obtained by the Quebec Police Force was not obtained in violation of Canadian Law.

ADMISSIBILITY OF WIRETAP EVIDENCE SEIZED PRIOR TO JUNE 30, 1974 IN CANADIAN COURTS

The Protection of Privacy Act is silent on the admissibility of wiretapped evidence obtained prior to June 30, 1974. It cannot be argued that lawfully obtained wiretap evidence is presently inadmissible, since the Act expressly provides for the admissibility of such evidence where "the interception was lawfully made." (Section 178.16(1)). Furthermore, it is clear that no legitimate purpose would be served by barring evidence lawfully obtained. The exclusionary rule is designed to serve a profilactic func-

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tion, by discouraging the activities which lead to the development of the evidence in question. *See, e.g., Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961). Here, however, no such purpose could possibly be served because the authorities are in Canada, and rulings by this court will have no impact on their activity. Finally, it is clear that the requirements of the Act for authorized wiretapping should not be retroactively applied. *Her Majesty the Queen* v. *Andre Desjardins et Jean-Claude Suneau*, Queen's Bench Court, Montreal, October 18, 1974.

TELEPHONIC CONVERSATIONS BETWEEN CANADA AND NEW YORK OR MEXICO

A more difficult question is presented with relation to tapes containing conversations between persons in Canada and New York, and Canada and Mexico. The penal provision of Title III prohibits any person from willfully intercepting any wire communication (18 U.S.C. § 2511(1)(a)). As defined under 18 U.S.C. § 2510,

> "[W]ire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception. . . . (Subd. (1))
>
> "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. (Subd. (3))
>
> "[P]erson" means any employer or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation. (Subd. (6))

> "Investigative or law enforcement officer" means any officer of the United States or of a state or political subdivision thereof. . . . (Subd. (7))

From these definitions it is clear that the class of persons upon whom criminal liability is imposed under section 2511 are those within the United States and not outside the United States. It further appears that the communications which are protected are the interstate communications. The court concludes that conversations intercepted by wiretaps installed on lines outside the United States do not come within the proscriptions contained in Title III, though they engage part of our interstate system of wire communication. See section 108 Public Law, 90-35 Congressional findings.

Thus it appears that though Congress may have had the power to declare the interception by persons in foreign lands of telephonic communications which in part use the wire communication system within the United States to be criminal conduct, it chose not to do so. In *United States* v. *Toscanino, supra* at 279-280, Judge Mansfield, holding that Title III "has no application outside of the United States," further noted that ". . . the statute significantly makes no provision for obtaining authorizations for a wiretap in a foreign country."

The motion to suppress seventeen telephonic conversations (Ex. 36, 37 and 38) is in all respects denied and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

APPENDIX D

Memorandum of Decision and Order, January 14, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 CR 898

UNITED STATES OF AMERICA

—against—

FRANK COTRONI and FRANK DASTI,

Defendants.

Defendant Dasti moves to suppress as evidence conversations seized by the Quebec Police in which he spoke with his wife, asserting that use of these conversations violates the husband-wife or marital privilege. Defendant's motion raises two questions:

1) whether the motion is timely; and

2) whether, even if timely, the defense is maintable.

Because the court reaches the latter question, it is unnecessary to consider the question of timeliness.

The husband-wife privilege is designed to protect the privacy of the marriage relationship from invasions which might endanger that relationship. Under this privilege, statements made by one spouse to the other are ordinarily inadmissible without the consent of both husband and wife. Similarly, the rule prohibits the testimony of one spouse against the other. However, society's interest in protecting the sanctity of the marriage relationship does not extend to the situation in which "both spouses are substantial participants in patently illegal activity." *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *cert.*

denied, 411 U.S. 986, 93 S.Ct. 2271 (1973). It is clear that marital harmony is not effected by admitting conversations which concern illegal activity, and that the privilege has no application in such situations.

In *United States* v. *Kahn*, *supra*, the United States obtained a warrant authorizing the wiretapping of Mr. Kahn's telephone, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510 *et seq.*) Mrs. Kahn was not named in the warrant, and defendants (Mr. & Mrs. Kahn) sought to suppress as evidence those conversations in which both husband and wife participated, asserting that these interceptions violated the marital privilege under the ninth amendment, the common law and 18 U.S.C. § 2517(4).[1]

The court held that because the conversations seized concerned ongoing criminal activity, none of the asserted privileges rendered them inadmissible. *Id.* at 195. In reaching this determination, the court cited several cases in which testimony which would otherwise be protected by the husband-wife privilege was admitted into evidence because it concerned participation in an unlawful enterprise. *United States* v. *Doughty*, 460 F.2d 1360, 1364 (7th Cir. 1972). *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). See also Uniform Rule of Evidence 28, Exception (2)(e); Note, Future Crime or Tort Exception to Communications Privilege, 77 Harv. L. Rev. 730, 734 (1964).

In addition, it is pertinent to note that although the Supreme Court declined to review the marital privilege

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[1] (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of the provisions of this chapter shall lose its privileged character.

issue raised in *Kahn*, it did consider a related question in the case. In *United States* v. *Kahn*, 415 U.S. 143, 94 S.Ct. 977 (1974), the Court held that although Mrs. Kahn was not named in the warrant, but was simply one of the persons described "as yet unknown", conversations involving her and her husband, as well as those involving her and third parties were admissible. The Court ruled that a valid warrant authorized interception of all conversations made on the tapped telephone which concerned the offenses described in the warrant.

From these decisions, it seems quite clear that the conversations in question here should not be suppressed. The court concurs with the views expressed by the Court of Appeals in the *Kahn* decision, and finds that the marital privilege does not bar admission of conversations such as those involved here, which are relevant to the investigation of illegal activity.

In this regard, it is important to point out that while some of the conversations appear to be entirely innocent in themselves, they concern events and activities integral to the conspiracy. These conversations therefore are highly relevant to the crime, linking defendant Dasti to the alleged offenses.

Defendant Dasti's motion to suppress the tapes is in all respects denied and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

APPENDIX E

Memorandum of Decision and Order, March 24, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 CR 898

UNITED STATES OF AMERICA

—against—

FRANK COTRONI and FRANK DASTI,

Defendants.

On January 21, 1975, at about 11:30 P.M., the jury returned a verdict of guilty against both defendants on both counts of the indictment, 73 CR 898, charging defendants with conspiracy to violate federal narcotics laws and a substantive narcotics violation, 21 U.S.C. §§ 173 and 174. The court, on its own motion, polled the jury in accordance with Fed. R. Crim. P. 31(d). After inquiring of counsel whether defendants wished to make any other applications before discharging the jury, and receiving a negative reply, the court discharged the jury.

In a letter dated February 23, 1975, addressed to the court, Muriel K. Lewis, a juror, wrote:

> In deliberations I changed my opinion from "not guilty to guilty." When I gave my decision to the court I was most sincere and convinced this was right.

Appendix E—Memorandum of Decision and Order, March 24, 1975

Based on Mrs. Lewis's statements indicating a self-examination as to how she arrived at a guilty verdict,[1] defendants move for a new trial or alternatively for "a hearing of the trial jurors so as to establish, on the record, whether or not a new trial would be appropriate."[2] Nothing in the letter indicates coercion of any kind except the discomfort and fatigue resulting from continuous deliberations over a period of ten hours.[3]

The case was given to the jury at about 12:30 P.M. The court provided the jury with lunch which was delivered to the jury room. At about 5:30 P.M., the court advised the jury that it would order dinner to be delivered to the jury room if the jurors believed deliberations would continue beyond 8:00 P.M. Sandwiches were served to

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[1] The substance of the complaint, if the letter is such, is stated in this part of the letter, which follows the portion above quoted:

> Now that I have had time to consider all aspects of the case again I find myself wondering why I changed my decision. Weakness in character? Perhaps. Combine that with complete exhaustion and you have a better picture. Is it standard procedure to let a jury deliberate for approximately ten hours without a break of any kind? Not even at lunch or dinner did we have time to relax and collect our thoughts. I think it is most unfair to the jurors as well as to the defendants—we all have to live with the decision.

[2] The court interprets the letter dated March 6, 1975, by counsel for defendant Cotroni as a motion for a new trial. Dasti joined in the motion.

[3] The letter reveals the juror's belief in the fairness of the trial and the jury process. It states:

> Judge Mischler [sic] I admire and respect the unbiased way you conduct your court. If in your opinion the verdict of guilty was a fair and just decision then please destroy this letter. I hope I have not offended you in any way.

the jurors at about 6:30 P.M. At no time did counsel object to this procedure.

The polling of the jury is a declaration of assent by each juror to the verdict and enables defendant to ascertain with certainty that each juror approves of the verdict. *Posey* v. *United States*, 416 F.2d 545 (5th Cir. 1969), *cert. denied*, 397 U.S. 946, 90 S.Ct. 965 (1970), *United States* v. *Edwards*, 469 F.2d 1362 (5th Cir. 1972). After a polling and discharge of the jury, a verdict can not be challenged by a juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict. *United States* v. *Schroeder*, 433 F.2d 846 (8th Cir. 1970), *cert. denied*, 400 U.S. 1024, 91 S.Ct. 591 (1971).

Internal influences, such as coercive forces present in argument during a jury's deliberation, as distinguished from external influences cannot serve to impeach a jury verdict, *United States* v. *Johnson*, 495 F.2d 1097 (5th Cir. 1974).[4] Thus, a post-verdict statement by a juror that he thought the defendant was innocent but that he was persuaded by the other jurors to vote guilty will not impeach the verdict, *United States* v. *Chereton*, 309 F.2d 197 (6th Cir. 1962), *cert. denied*, 372 U.S. 936, 83 S.Ct. 883 (1963), *United States* v. *Betancourt*, 427 F.2d 851 (5th Cir. 1970). Post-verdict testimony of the motives of a juror is impertinent, *United States* v. *Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied*, 368 U.S. 984, 82 S.Ct. 599, rehearing denied, 369 U.S. 881, 82 S.Ct. 1138 (1962).[5]

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[4] A verdict must be set aside where adverse publicity affected a jury's verdict. *United States* v. *Rattenni*, 480 F.2d 195 (2d Cir. 1973).

[5] Juror testified that his verdict was influenced by information he obtained from a newspaper that the co-defendant pleaded guilty.

Similarly, the possibility of fatigue through extended deliberations is an ineffective attack on a jury verdict, *United States* v. *Tubbs*, 461 F.2d 43 (7th Cir. 1972), *cert. denied*, 409 U.S. 873, 93 S.Ct. 205.[a]

The motion for a new trial or alternatively for a hearing is in all respects denied and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

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[a] Court's denial of defense counsel's request to suspend jury's deliberation at 4:00 A. M. not an abuse of discretion.

APPENDIX F

Telephone Calls Used In Evidence*

Appendix	*Call #*	*Tap*	*Period*	*Parties and Location*	*Long Distance*
1756	1	1B	4 PM 12/30/70 - 4 PM 12/31/70	Oddo (New York) to Dasti (Canada)	N.Y.
1763	2	1B	4 PM - 8 PM 12/31/70	Oddo (New York) to Dasti (Canada)	N.Y.
1766	3	3	8 AM - 4 PM 1/ 1/71	Dasti (Canada) to Oddo (New York)	N.Y.
1772	4	3	8 AM - 4 PM 1/ 1/71	Dasti (Canada) to Cotroni (Canada)	
1781	5	1B	10 AM - 4 PM 1/ 2/71	Oddo (New York) to Dasti (Canada)	N.Y.
1786	6	1B	10 AM - 4 PM 1/ 4/71	Oddo & Vanacora (New York) to Dasti (Canada)	N.Y.
1791	7	1B	10 AM - 5:30 PM 1/5/71	Oddo & Vanacora (New York) to Dasti (Canada)	N.Y.
1793	8	1B	8 PM - Mid. 1/5/71	Oddo & Vanacora (New York) to Dasti (Canada)	N.Y.
1904	9	3	8 PM - Mid. 1/8/71	Dasti (Canada) to Wife (Canada)	
2009	10	5	8 AM - 8 PM 1/12/71	Dasti (New York) to Cotroni (Mexico)	N.Y.
2015	11	1B	10 AM - 8 PM 1/13/71	Dasti (Canada) to Wife (Canada)	
2019	12	PT	10 AM - 8 PM 1/15/71	Cotroni (Mexico) to Dasti (Canada)	Mex.
2025	13	1B	10 AM - 7:30 PM 1/15/71	Oddo (New York) to Dasti (Canada)	N.Y.
2025	14	Laurentian Hotel	10 AM 1/16/71	Oddo (New York) to Dasti (Canada)	N.Y.
2026	15	1B	10 AM - 8 PM 1/16/71	Oddo (New York) to Dasti (Canada)	N.Y.

* Recording available only for calls 1-17; remainder are summaries and memory. Appendix references are to point in the record where conversation is played for jury or summarized. Exact times of calls not available due to automatic recording system.

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Appendix	*Call #*	*Tap*	*Period*	*Parties and Location*	*Long Distance*
2024	16	PT	10 AM - 8 PM 1/16/71	Dasti (Canada) to Cotroni (Mexico)	Mex.
2055	17	PT	10 AM - 8 PM 1/20/71	Dasti (Canada) to Cotroni (Mexico)	Mex.
1999	18	5	———1/10/71	Horvath (Canada) to Cotroni (Canada)	
2005	19	5	8 PM 1/10/71 - 8 PM - 1/11/71	Dasti (New York) to Cotroni Maid (Canada)	N.Y.
2006	20	5	8 PM 1/10/71 - 8 PM 1/11/71	Cotroni (Canada) to Cotroni Maid (Canada)	
2007	21	5	8 PM 1/11/71 - 8 PM 1/12/71	Cotroni (Canada) to Cotroni Maid (Canada)	
2016	22	3	8 PM 1/12/71 - 8 PM 1/13/71	Cotroni (Canada) to Dasti (Canada)	
2017	23	3	8 PM 1/13/71 - 8 PM 1/14/71	Dasti (Canada) to Wife (Canada)	
2052	24	1B	8 PM 1/16/71 - 8 PM 1/17/71	Dasti (Canada) to Wife (Canada)	
2053	25	3	8 PM 1/16/71 - 8 PM 1/17/71	Oddo (New York) to Dasti (Canada)	N.Y.
2054	26	PT	8 PM 1/19/71 - 8 PM 1/20/71	Orsini (Canada) to Dasti (Canada)	
2061	27	1B	8 PM 1/20/71 - 8 PM 1/21/71	Cotroni (Mexico) to Carlino (Canada)	Mex.
2062	28	1B	8 PM 1/20/71 - 8 PM 1/21/71	Carlino (Canada) to Dasti (Canada)	
2063	29	12	8 PM 1/20/71 - 8 PM 1/21/71	Orsini (Canada) to Cotroni (Mexico)	Mex.
2065	30	3	8 PM 1/20/71 - 8 PM 1/21/71	Dasti (Canada) to Orsini (Canada)	
2066	31	12	8 PM 1/21/71 - 8 PM 1/22/71	Cotroni (Mexico) to Orsini (New York)	Mex.
2118	32	3	8 PM 1/21/71 - 8 PM 1/22/71	Horvath (Canada) to Dasti (Canada)	

FOLD AND TAPE — DO NOT STAPLE — PAGES BOUND VERTICALLY